UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CALIFORNIA VALLEY MIWOK TRIBE,
11178 Sheep Ranch Road
Mountain Ranch, CA 95246

THE TRIBAL COUNCIL,
11178 Sheep Ranch Road
Mountain Ranch, CA 95246

YAKIMA DIXIE,
11178 Sheep Ranch Road
Mountain Ranch, CA 95246

VELMA WHITEBEAR,
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EVELYN WILSON
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ANTOINE AZEVEDO,
4001 Carriebee Court
North Highlands, CA 95660

Plaintiffs,

v.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior,
United States Department of the Interior

Case No. 1:11-CV-00160-RWR

1849 C Street, N.W.
Washington, D.C. 20240
LARRY ECHO HAWK, in his official capacity as Assistant Secretary-Indian Affairs of the United States Department of the Interior,
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

MICHAEL BLACK, in his official capacity as Director of the Bureau of Indian Affairs within the United States Department of the Interior,
Bureau of Indian Affairs
MS-4606
1849 C Street, N.W.
Washington, D.C. 20240

Defendants.

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVEOR DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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I. INTRODUCTION

Pursuant to Rules 12(b)(1), 12(b)(6), and 19 of the Federal Rules of Civil Procedure, Intervenor-Defendant the California Valley Miwok Tribe ("Tribe") respectfully submits its Statement of Points and Authorities in Support of its Motion to Dismiss the Plaintiffs' First Amended Complaint For Declaratory and Injunctive Relief ("Amended Complaint"). As elaborated below, the instant action must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because this Court lacks jurisdiction over Plaintiffs' claims for three distinct and compelling reasons. First, as demonstrated definitively and once and for all by Assistant Secretary Larry Echo Hawk's August 31, 2011 final agency action ("August 2011 Decision"), Plaintiffs,[1] as individuals that have never in the Tribe's entire history been recognized by either the Tribe or the United States as members of this Tribe, lack standing to bring the claims raised in the Amended Complaint, and this Court, accordingly, lacks jurisdiction over their claims. Second, based upon decades of well-established federal precedent, this Court lacks jurisdiction to adjudicate internal tribal disputes, as was the scope of the issue within the August 2011 Decision, and which Plaintiffs' unabashedly seek to challenge under the guise of an APA action. Third and finally, Plaintiffs' Amended Complaint asserts time-barred claims that are outside of this Court's jurisdiction.

An alternate but equally compelling ground for dismissal exists pursuant to Fed. R. Civ. P. 19, because Plaintiffs have failed to join the Tribe, who is unequivocally a necessary and indispensable party to the instant action. The final ground for this Court's dismissal of the

[1] It is undisputed that Yakima Dixie is a member of the Tribe. However, Mr. Dixie's position as Tribal member puts him in no better a position than the Non-Members with respect to the issue of standing as federal courts routinely dismiss lawsuits by individual tribal members seeking to pursue a tribal claim due to lack of standing. *See infra,* Section III(A)(1)(a)(ii).

instant action is pursuant to Fed. R. Civ. P 12(b)(6), as the Amended Complaint fails to state any claims against the United States upon which relief can be granted. Based on any or all of the above-enumerated grounds that exist for dismissal, the Tribe respectfully requests that the Court dismiss Plaintiffs' Amended Complaint.

In his August 2011 Decision, the Assistant Secretary issued the final and definitive position of the United States with respect to the California Valley Miwok Tribe. *See* Declaration of Robert A. Rosette In Support of Proposed Intervenor-Defendant's Motion To Dismiss Plaintiff's First Amended Complaint For Declaratory and Injunctive Relief ("RAR Decl.") at ¶ 18, Ex. P thereto. In the August 2011 Decision, the Assistant Secretary thoroughly detailed close to a century of the United States' relationship with the Tribe. Based upon numerous final agency actions of the United States (which Plaintiffs' never challenged), as well as administrative and federal court proceedings, the United States made clear that the Tribe's "***entire citizenship***…consists of the five acknowledged citizens" – Yakima Dixie, Silvia Burley, Rashel Reznor, Anjelica Paulk and Tristian Wallace. (*Id.* at p. 6, 18). In reaffirming the holdings of the decision issued on December 22, 2010, the August 2011 Decision definitively "clear[ed] away the misconceptions that [the Non-Members] have inchoate citizenship that the Secretary has a duty to protect, noting that "the five acknowledged citizens are the ***only*** citizens of the Tribe, and the General Council of the Tribe has the exclusive authority to determine the citizenship criteria for the Tribe." (*Id.* at p. 3) (emphasis added) Citing decades of well-established federal Indian policy and precedent, the August 2011 Decision also asserts that "[t]he Federal government is under no duty or obligation to 'potential citizens' of the [Tribe]," and that [t]hose potential citizens, if they so desire, should take up their cause with the [Tribe's] General Council directly." (*Id.* at p. 7)

Consistent with the fact that the United States is under no "duty or obligation" to the Non-Member Plaintiffs, this Court is also under no duty or obligation to preside over the Non-Members' instant action as their lack of standing to bring this suit is glaring. Even if Plaintiffs had standing to challenge the August 2011 Decision, they cannot prevail on any of their claims and failed to join the most obvious necessary and indispensable party, the Tribe, to this action.

Moreover, rather than follow the Assistant Secretary's determination and direction to "work within the Tribe's existing government structure to…bring this contentious period in the Tribe's history to a close," the Non-Member Plaintiffs refuse to even submit enrollment applications to the Tribe for its consideration of their membership into the Tribe. (*Id.* at p. 8.) Plaintiffs seek instead to jeopardize the judicial economy of this Court in an effort to undermine years of well-established federal Indian law precedent and policy and have this Court intrude into delicate matters of internal tribal affairs and convert non-members to be members of this Tribe. This Court is without jurisdiction to do so. For this reason and for those further elaborated below, the Tribe respectfully requests that Plaintiffs' Amended Complaint.

II. FACTS

The relevant facts of this case are set forth in the Tribe's Statement of Points and Authorities In Support of Proposed Intervenor-Defendant's Amended Motion For Leave To Intervene As Defendant. For the Court's convenience, the Tribe incorporates those facts by reference as if set forth here in full.

III. ARGUMENT

A. <u>This Court Lacks Subject Matter Jurisdiction</u>.

In ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the court is not limited to the allegations of the complaint, but can consider matters outside the complaint. *Marsh v. Johnson,* 263 F.Supp.2d 49, 54 (D.D.C. 2003). Indeed, the factual allegations in the complaint receive "closer scrutiny" than they do in the case of a motion brought under Fed. R. Civ. P 12(b)(6), for the reason that "subject matter jurisdiction focuses on the court's power to hear the claim." *Id.; Bobreski v. U.S. Environmental Protection Agency,* 284 F. Supp. 2d 67, 72 (D.D.C. 2003). Further, the "plaintiff must bear the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims." *Bennett v. Ridge,* 321 F.Supp 2d 49, 51 (D.D.C. 2004); *Grand Lodge of the Fraternal Order of Police v. Ashcroft,* 185 F.Supp 2d 9, 13 (D.D.C. 2001). Moreover, a Rule 12(b)(1) "motion imposes on the court an affirmative duty to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge,* 185 F.Supp. 2d at 13.

The issue of the Tribe's sovereign authority to govern its internal affairs and determine its own membership is at the heart of its right to self-governance. At its core, this case involves an intratribal membership dispute, as it presents sensitive issues of tribal, not federal law. As demonstrated below, this Court lacks subject matter jurisdiction for three distinct and compelling reasons. First, both Yakima Dixie and the Non-Member Plaintiffs lack requisite Article III standing to bring the instant action. Second, based on well-established federal precedent, this Court lacks jurisdiction to adjudicate internal tribal disputes and to enroll non-members into a federally recognized Indian tribe, as Plaintiffs erroneously seek in their Amended Complaint. (Amended Complaint, p. 30, ¶ F). Finally, in their Amended Complaint, Plaintiffs assert time-barred claims over previous final agency actions of the United States that were left unchallenged

and which Plaintiffs now audaciously urge this Court to revisit and undo. Accordingly, Plaintiffs' Amended Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

1. Plaintiffs Lack Standing to Bring the Instant Action.

Because the United States Constitution limits the jurisdiction of federal courts to actual cases and controversies, plaintiffs bear the burden of proving that they have standing to sue. *See Florida Audubon Soc'y v. Bentsen,* 94 F.3d 658, 661 (D.C. Cir. 1996); U.S. Const. art. III, § 2.

> The 'irreducible constitutional minimum of standing contains three elements:'(1) the plaintiff must have suffered injury in fact, an actual or imminent invasion of a legally protected, concrete and particularized interest; (2) there must be a causal connection between the alleged injury and the defendant's conduct at issue; and (3) it must be 'likely', not 'speculative' that the court can redress the injury.

Ctr. for Law & Educ. v. Dep't of Educ., 396 F.3d 1152, 1157 (D.C. Cir. 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). As the parties seeking to invoke federal jurisdiction, Plaintiffs bear the burden of demonstrating that they have standing in this action. *Lujan*, 504 U.S. at 561. Plaintiffs must demonstrate standing "for each claim [they] seek[ ] to press" and for "each form of relief sought." *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (citations omitted).

Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq., a proper plaintiff must be a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . ." 5 U.S.C. § 702. A plaintiff must demonstrate that it has suffered injury-in-fact and that it falls within the zone-of-interests intended to be protected by the governing statute. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883, citing *Clarke v. Sec. Indus. Assoc*., 479 U.S. 388, 396-397 (1987); *Humane Soc'y of U.S. v. U.S. Postal Service*, 609 F.Supp.2d 85, 94 (D.C.C. 2009), citing *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 524 (1991). Plaintiffs have failed to meet the requisite

standard for standing in the instant action and, consequently, this Court must dismiss their Amended Complaint for lack of subject matter jurisdiction.

a. Plaintiffs Have Not Suffered Any Injury-In-Fact and Are Thus Not "Aggrieved" Within the Meaning of the APA.

Article III standing requires that a plaintiff allege "such a personal stake in the outcome of the controversy" as to warrant invocation of the court's jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) . A proper plaintiff must show an injury stemming from an "invasion of a legally protected interest" which is "concrete and particularized." *Lujan*, *supra*, 497 U.S. at 560. Under the APA, a plaintiff must allege perceptible harm by the challenged agency action, "not that he can imagine circumstances in which he could be affected by the agency's action." *U.S. v. SCRAP*, 412 U.S. 669, 689 (1973). Both the Non-Member Plaintiffs and Mr. Dixie fail to demonstrate in their Amended Complaint, any injury whatsoever resulting from the August 2011 Decision, despite the "great injury" of which they allege. (Amended Complaint ¶ 82).

i. The Non-Member Plaintiffs Can Demonstrate No Injury Resulting From the August 2011 Decision, As They Were Never Recognized As Members of the Tribe Both Prior and Subsequent to Issuance of the Decision.

Despite Plaintiffs' repeated misleading assertions in their Amended Complaint that they are the Tribe, Tribal Council and Tribal Members, they nonsensically state that the August 2011 Decision denied them "the benefits of Tribe membership." (Amended Complaint, ¶ 82). The August 2011 Decision did no such thing. Indeed, the Non-Members' enrollment and membership in the Tribe was never considered or discussed in detail in the August 2011 Decision, as the Decision made clear that the Tribe already had in place an existing governing body and Tribal membership, and as a consequence, the Federal government did not "have a legitimate role in attempting to force the Tribe to expand its citizenship." (RAR Decl., Ex. P, p.

6.) The Non-Member Plaintiffs were also never once mentioned by name in the August 2011 Decision, and, understandably so. The record is abundantly clear, based on the history of the Tribe and almost a century of relations with the United States, that the Non-Member Plaintiffs have never once been recognized as members of the Tribe, nor have they otherwise been recognized as having any rights to or interests in the Tribe. Indeed, Plaintiffs cannot point to one document from the United States government which demonstrates how they have a "concrete and particularized" "legally protectable interest" in the instant action. *Lujan, supra*, 497 U.S. at 560. Plaintiffs, therefore, were not stripped of rights to Tribal membership as a result of the August 2011 Decision, because they never *had* such rights in the first instance. Further, the submission of "genealogies and other documentation to the BIA" did not confer upon the Non-Member Plaintiffs the rights and benefits of Tribal membership, or otherwise authorize them to claim that they are Tribal members in federal litigation. (Amended Complaint, ¶ 74). Such attenuated claims to tribal interests by non-members run in direct contravention to principles of tribal sovereignty and autonomy, which courts have appropriately recognized. *See Displaced Elem Lineage Emancipated Members Alliance v. Sacramento Area Director, BIA*, 34 IBIA 74, 77 (1999) (holding that former tribal members lack standing to challenge internal tribal affairs); *Chris C. White v. Acting Muskogee Area Director, BIA*, 29 IBIA 39, 41 (1996) (declining to consider challenge to BIA approval of tribal legislation by non-member based on "the Federal policy of respect for tribal self-government"); and *Bingham v. Massachusetts*, 2009 WL 1259963 (D.Mass 2009), at *2 (holding that a group that merely purported to be descendants of the Tribe "does not mean that the plaintiffs represent the tribe or can assert the tribe's rights.").

The August 2011 Decision's reaffirmation of the Tribe's five member citizenship was based on the Tribe's well-documented history with the United States and was not an

independent, arbitrary finding of the Assistant Secretary. The Non-Members' purported injury in their "[d]enial of Tribal membership" occurred repeatedly throughout the Tribe's history as the United States ***has never recognized these individuals as Tribal members***. (Amended Complaint, ¶ 74). Yet, this is the only time in the Tribe's history that the Non-Members confusingly choose to challenge their lack of recognition. The record is clear - the Non-Member Plaintiffs were not Tribal members at any time prior to the issuance of the August 2011 Decision – and they are still not members now. Therefore, no possible injury-in-fact could have resulted to the Non-Member Plaintiffs as a result of the August 2011 Decision.[2]

The most efficient and procedurally-appropriate manner for the Non-Member Plaintiffs to address their purported injuries is for them to "take up their cause with the [Tribe's] General Council directly," and submit enrollment applications with the Tribe. (RAR Decl., Ex. P.) This, however, is a course of action which the Non-Member Plaintiffs bewilderingly refuse to take, preferring instead to jeopardize the judicial economy of this Court and exacerbate the social and economic hardships of the Tribe and its recognized members by prolonging the implementation of the August 2011 Decision.

[2] Moreover, the United States District Court for the Eastern District of California previously recognized both Mr. Dixie and the Non-Members' lack of standing to assert claims to tribal assets in October 2009 when the Court dismissed a lawsuit brought by Intervenors in which they attempted to retrieve tribal records. *See* Ex. A to Rosette Decl.; The court found that Intervenors lacked standing to bring such an action and imposed sanctions upon Intervenors' counsel, Thomas Wolfrum, for failing to "make a reasonable investigation into the merits of the case prior to filing the action," which "resulted in a waste of judicial resources and unnecessary costs to Defendants." *See* Ex. A to Rosette Decl., p.2, ll.20-25. Therefore, neither Mr. Dixie nor the Non-Members have ever been recognized as having standing to assert claims to Tribal assets, and their previous attempts to do so have been rejected in federal court for lack of standing.

ii. Yakima Dixie Has Not Been Injured by the August 2011 Decision As His Rights as a Tribal Member Were Affirmed and Any Concerns Cited in the Amended Complaint Are Speculative

It is undisputed that Yakima Dixie is a member of the Tribe with all the rights and benefits resulting thereto, as was explicitly reaffirmed by the August 2011 Decision. However, Mr. Dixie's position as a Tribal member puts him in no better a position than the Non-Members with respect to the issue of standing and demonstration of injury-in-fact. *See Epps v. Andrus,* 611 F.2d 915, 918 (1st Cir. 1979) (holding that individual Indians did not have standing to bring claim for illegal conveyances of tribal property under the Nonintercourse Act); *Attakai v. United States,* 746 F. Supp. 1395, 1402 (D. Ariz. 1990) (holding that individual members of a tribe did not have standing to challenge denial of access to sites with tribal significance); *Canadian St. Regis Band of Mohawk Indians v. New York,* 573 F. Supp. 1530, 1534-1537 (N.D.N.Y. 1983) (holding that individual plaintiffs did not have standing to bring a claim under the Nonintercourse Act, finding that "the legal rights and interests are those of the tribe, and must be asserted by it...the individual plaintiffs are not a tribe and do not represent a tribe; [therefore]; they lack standing to assert the claims that tribal land was alienated."); *see also Benally v. Hodel,* 940 F.2d 1194, 1199-1200 (9th Cir. 1991) (holding that individual members of tribe did not have standing to assert broad challenge to act that affected all tribal members generally); *James v. Watt,* 716 F.2d 71, 72 (1st Cir. 1983) (holding that individual members could not sue under the Indian Nonintercourse Act).

Moreover, the August 2011 Decision explicitly acknowledges, (and Plaintiffs readily admit in their Amended Complaint), that Mr. Dixie, as a member of the Tribe and its governing body, possesses all the rights and privileges to participate in the Tribe's self-governance and conduct government to government relations with the United States. (RAR Decl., Ex. P). With

such recognition, Mr. Dixie clearly benefitted from the August 2011 Decision and its recognition of his rights and authority as a Tribal member. Moreover, any concerns cited in the Amended Complaint pertaining to Mr. Dixie's lack of access to State Funds held in the name of the ***Tribe*** (and not any individual member) is clearly speculative and insufficient to demonstrate standing. *United Transportation Union v. ICC*, 891 F.2d 908, 911-13 (D.C.Cir.1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3271, 111 L.Ed.2d 781 (1990) (rejecting allegations that cannot be described as true or false as too speculative for standing). Because the final agency action of which he is bewilderingly seeking judicial review benefits Mr. Dixie and because no injury resulted to the Non-Members in connection with the August 2011 Decision as they have never members of the Tribe to begin with, Plaintiffs failed to demonstrate any injury-in-fact, and consequently, lack standing to bring the instant action pursuant to the aforementioned case law.[3]

b. <u>There Is No Causal Link Between the Decision and the "Injuries" Plaintiffs Allege.</u>

To establish standing, Plaintiffs must allege a "fairly traceable connection between [their] injury and the complained-of conduct of the defendant[s]. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103 (1998). Indeed, "[n]o more fundamental component of standing doctrine exists than the requirement of a presentable demonstrable injury in fact directly traceable to the defendant's supposedly unlawful actions." *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 54 (D.C. Cir. 1991). For the same reason that Plaintiffs cannot demonstrate any injury-in-fact,

[3] Even if Mr. Dixie was able to somehow allege that he was an "aggrieved party" within the meaning of the APA, his claims pertaining to judicial review of the August 2011 Decision would still be barred for lack of standing, as federal courts routinely dismiss cases brought by tribal members involving internal tribal disputes and membership issues for lack of jurisdiction, as was the scope of the issue decided by the Assistant Secretary. *See In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*, 340 F.3d 749, 764 (8th Cir. 2003) ("[j]urisdiction to resolve internal tribal disputes . . . and issue tribal membership lies within Indian tribes and not in the district courts"); *Bullcreek v. U.S. Dept. of Interior*, 426 F.Supp.2d 1221, 1231-33 (D. Utah 2006).

Plaintiffs also fail to show that their alleged and hypothetical injury "is dependent upon" the August 2011 Decision. *Wilderness Soc'v v. Griles,* 824 F.2d 4, 18 (D.C. Cir. 1987).

In their Amended Complaint, Plaintiffs' allege being denied "the benefits of Tribe membership" and the suffering of "irreparable injury and financial loss," "[a]s a direct and proximate result of the [August 2011 Decision]." (Amended Complaint ¶¶ 107-110) Despite these grand assertions, the Amended Complaint utterly fails to assert a causal link connecting these purported injuries and the August 2011 Decision.

The August 2011 Decision explicitly acknowledges Mr. Dixie as a member of the Tribe's General Council, and he is thus entitled to participate in and affect Tribal government action as a voting member of the General Council. (RAR Decl., Ex. P) Yakima Dixie has not been precluded, denied, or even discouraged from participating in Tribal governance. Indeed, Mr. Dixie's failure to involve himself in Tribal governance is a personal decision wholly unto himself and has absolutely nothing to do with the August 2011 Decision, which, in fact, encourages his participation in the Tribe's self-governance. (RAR Decl, Ex. P). It is evident that Mr. Dixie's position as a Tribal member, and the authorities and privileges related thereto, were bolstered by the August 2011 Decision. Because no "irreparable injury" is demonstrated in the Amended Complaint that is "fairly traceable" to the August 2011 Decision, Plaintiff Dixie has failed to establish standing to bring the instant action.

As for the Non-Members, they cannot legitimately claim a denial of benefits that they ***never once*** enjoyed before the August 2011 Decision. The Non-Members have not been stripped of membership status as a result of the August 2011 Decision. Indeed, they ***never once in the Tribe's entire history*** had membership status within this Tribe. Plaintiffs seek to pursue statutorily-barred grievances pertaining to past BIA determinations that definitely determined

and confirmed the governing body and membership of this Tribe under the guise of challenging the August 2011 Decision. However, nothing in Plaintiffs' Amended Complaint supports or confirms Plaintiffs' unfounded assertions that a group of individuals who have submitted genealogical records to the BIA in the hopes of asserting a *claim to potential future membership* in this Tribe, ***had, at any time, enjoyed any benefits of Tribal membership*** up until the issuance of the August 2011 Decision. It is a complete factual misrepresentation to allege otherwise. There is no injury that is "fairly traceable" to the August 2011 Decision. As the Non-Members have never been recognized as Tribal members in almost a decade of the United States' dealings with the Tribe, the August Decision 2011 merely confirmed this well-established record, resulting in no injury to the Non-Members and, therefore, precluding them from legitimately asserting that their injuries are causally connected to the August 2011 Decision.

With respect to Plaintiffs' claims to the monies held in the Tribe's name by the State of California, such funds are held in trust for the benefit of the ***Tribe***, not for any individual Tribal member, and certainly not for the benefit of Non-Members. It is well settled law that individual tribal members do not have standing to claim right to tribal assets simply by way of their membership. *See N. Paiute Nation v. U.S.,* 8 Cl.Ct. 470, 480-81 (1985), citing *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902) ("the general rule is that '[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.'"); *see also Seneca Constitutional Rights Organization v. George,* 348 F.Supp.51 (W.D.N.Y. 1972) (holding that plaintiff tribal members lacked standing to challenge the expenditure of tribal funds contemplated by the Seneca Tribal Council because plaintiffs could allege no connection between the official action being challenged and some legally-protected interest of plaintiffs, and since it is established that a tribe has full authority to

use and dispose of tribal property and that no individual Indian has an enforceable right to such property.) As recognized tribal members are unable to assert claims to tribal assets, it is even more evident that the Non-Members — individuals that have never once been recognized as members of the Tribe — would be unable to assert claims assets belonging in the name of the Tribe. *See Bingham*, 2009 WL 1259963 at *2 (holding that a group that merely purported to be descendants of the Tribe "does not mean that the plaintiffs represent the tribe or can assert the tribe's rights.")

Plaintiffs' conjured "injuries" set forth in the Amended Complaint fail to establish a cognizable causal connection between the alleged deprivation of Tribal benefits and the August 2011 Decision. Because none of Plaintiffs' alleged injuries actually result from the federal action Plaintiffs' seek to set aside, Plaintiffs have no standing to bring the instant action.

c. Plaintiffs' Conjured Injuries Are Not Redressable By This Court.

Because Plaintiffs' asserted injuries are conjectural and speculative rather than actual or imminent, and because Plaintiffs' seek relief that this Court cannot provide, they also are non-redressable. Redressability hinges on whether relief from the court "will likely alleviate the particularized injury alleged by the plaintiff." *Florida Audubon Society*, 94 F.3d at 663-664. Further, 5 U.S.C. § 702 requires a plaintiff to show from the outset of the litigation that the purported injury was caused by the final agency action and falls within the "zone of interest" to be protected by the APA. *Assoc. of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *Clarke, supra*, 479 U.S. at 395-396. The issue turns on "whether the interest sought to be protected…is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Assoc. of Data Processing, supra*, 397 U.S. at 153.

For the same reasons that causation is absent in this case, the requirement of

redressability is also lacking. If this Court were to grant the relief Plaintiffs request and invalidate the Assistant Secretary's reaffirmation of the Tribe's membership and governing body, or, if it were to even remand the August 2011 Decision back to the Assistant Secretary for ***even further*** consideration, such judgment would not, in anyway, change the Plaintiffs' status as non-members of this Tribe. Thus, it would have no effect on Plaintiffs' conjured injuries. Nor would such action by this Court redress Mr. Dixie's purported injuries as the August 2011 Decision was beneficial to Mr. Dixie in the first instance.

Further, Plaintiffs' claims are not within the zone of interest. Plaintiffs are not properly before this Court under the guise of their APA claim because the redress Plaintiffs seek is judicial affirmation that they are tribal members, a matter well beyond this Court's jurisdiction *See infra* Section III(A)(2); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72, 54 (1978) ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence" and "[t]o abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it"), and *Smith v. Babbit*, 875 F.Supp. 1353, 1360 (D.Minn.1995) (noting that "[t]he great weight of authority holds that tribes have exclusive authority to determine membership issues.")

Each of the alleged "injuries" set forth in Plaintiffs' Amended Complaint will not and cannot be redressed until the Non-Member Plaintiffs navigate the Tribe's enrollment procedures. The redress truly sought cannot be awarded by this Court. Even if Plaintiffs were awarded a favorable decision on their APA claim, their "injuries" would still exist. Redress by way of this action is not only unlikely, it is impossible. Plaintiffs, therefore, lack standing not only because they have no injury that was caused by the United States, but also because any ability by the Court to address the alleged injury is absent. *See Nat'l Wrestling Coaches Ass'n v. Dep't of*

Educ., 366 F.3d 930, 936-37 (D.C. Cir. 2004) (lack of redressability alone defeats plaintiffs' standing to sue).

Plaintiffs lack the necessary standing to bring this action because they have not asserted a true and legitimate injury-in-fact that was caused by the August 2011 Decision and that can be redressed by this Court. Plaintiffs' allegations and perceived harm is not within the zone of interest of the APA because their interest in, and goal of, attaining tribal membership status is far too removed from the judicial review of the August 2011 Decision to properly vest this Court with subject matter jurisdiction within the meaning of Fed. R. Civ. P. Rule 12(b)(1). For the reasons discussed above, the Court should dismiss Plaintiffs' Amended Complaint for their lack of standing and the Court's lack of subject matter jurisdiction to hear their claims.

2. This Court Lacks Jurisdiction to Adjudicate Internal Tribal Disputes.

Despite the various statutes and causes of action cited in the Amended Complaint, the instant action is simply an attempt to secure Federal judicial review for what is, and what always has been, an intra-tribal dispute. (*See, e.g.*, RAR Decl. Ex. L; Ex. P; *California Valley Miwok Tribe*, 51 IBIA 103, 122 (January 28, 2010). Plaintiffs' allege grievances pertaining to their lack of recognition as members of the Tribe, an issue repeatedly and appropriately recognized in various forums as a Tribal enrollment dispute. (*Id.*) Recognizing that it lacked jurisdiction to adjudicate Tribal enrollment disputes, the IBIA appropriately referred the matter to the Assistant Secretary for final determination. (*Id.*) In reviewing the matter presented before him on not one, but two separate occasions, the Assistant Secretary finally held that because the Tribe had an established and duly recognized governing body and membership, even the Department of the Interior, with its broad authority over Indian affairs pursuant to 25 U.S.C. §2, could not legally "intru[de] into a federally-recognized tribe's internal affairs." (RAR Decl., Ex. P, p. 6). Despite

consistent and continual declination to entertain Plaintiffs' claims and open up the established membership of this Tribe, Plaintiffs now seek determination of its enrollment grievances by this Court, which, as elaborated below, is a forum that could never have subject matter jurisdiction to entertain Plaintiffs' claims.

It is well-settled that Federal courts lack jurisdiction to intrude upon delicate internal tribal affairs, such as those pertaining the membership and enrollment matters.[4] *See, e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) ("[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence); *Smith v. Babbit*, 875 F.Supp. at 1362, *aff'd* 100 F.3d 556 (8th Cir. 1996) ("Federal courts do not have jurisdiction to resolve tribal law disputes."); *Montana v. U.S.*, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) ("Indian tribes retain their inherent power to determine tribal membership.") (citing *United States v. Wheeler*, 435 U.S. 313, 322 n. 18, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)); *See also Williams v. Gover*, 490 F.3d 785 (9th. Cir. 2007) (holding that potential members of tribe were not denied due process of law when tribal membership was narrowly defined by Indian tribe itself.); *Prairie Band of Pottawatomie Tribe v. Udall*, 355 F.2d 364 (10th Cir. 1966); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10 Cir. 1974); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Apodaca v. Silvas*, 19 F.3d 1015, 1016 (5th Cir. 1994) (per curiam)("providing a federal forum for the resolution of [membership] disputes would illegitimately interfere with tribal autonomy and self-government."); *Lewis v. Norton*, No. CIV.

[4] Support for this fundamental tenant of Federal Indian law and policy has recently been expressed by the National Congress of American Indians ("NCAI"), the oldest and largest organization of American Indian and Alaska Native tribal governments. On November 2, 2011, NCAI adopted Resolution #PDX-11-014 (the "NCAI Resolution"), which expressly supports the August 2011 Decision and "opposes any effort by state or federal governments or courts to interfere with tribal internal decision making." (RAR Decl. ¶ 19, Ex. Q thereto)

S-03-1476 slip op. at 7 (E.D. Cal. Nov. 4, 2003) ("It is by now well-established that an Indian tribe has exclusive jurisdiction over wholly internal tribal subject matter, such as membership disputes…"); *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan,* 967 F.Supp. 966, 967 (E.D. Mich. 1997) *aff'd*, 156 F.3d 1230 (6th Cir. 1998) ("this court finds that it lacks jurisdiction to hear what is essentially a membership dispute between Plaintiffs and the Tribe."); *Montgomery v. Flandreau Santee Sioux Tribe,* 905 F.Supp. 740, 746 (D.S.C. 1995) ("Giving deference to the Tribe's right as a sovereign to determine its own membership, the Court holds that it lacks subject matter jurisdiction to determine whether any plaintiffs were wrongfully denied enrollment in the Tribe.")

Moreover, "[f]ederal court jurisdiction does not reach this matter simply because the plaintiffs carefully worded their complaint." *Smith v. Babbit,* 100 F.3d at 559. In their Amended Complaint, Plaintiffs allege violations of the APA, the U.S. Constitution, and the Indian Civil Rights Act ("ICRA"). (Amended Complaint, ¶¶ 90-119). However, upon closer examination, it is evident that "these allegations are merely attempts to move this [internal tribal] dispute, over which this [C]ourt would not otherwise have jurisdiction, into federal court." *Smith v. Babbit,* 100 F.3d at 559. This Court cannot, and appropriately should not, permit Plaintiffs to pursue their enrollment grievances in this forum, as this Court lacks the necessary subject matter jurisdiction to do so pursuant to the aforementioned authority — despite Plaintiffs' attempts to cloak an undisputed enrollment dispute under the guise of an APA action. Leaving these issues to the Tribe and to the Tribe alone is what current Federal law and policy towards Indian self-determination requires.

3. Plaintiffs' Claims Are Time-Barred, Warranting Dismissal of This Action.

A separate and independent jurisdictional basis warranting dismissal of Plaintiffs' Amended Complaint is that the Plaintiffs' challenge to past BIA determinations, under the guise of challenging the August 2011 Decision, is statutorily prohibited as time-barred. Claims which arise under the APA are subject to the statute of limitations governed by 28 U.S.C. § 2401(a), which bars civil actions against the United States that are not filed within six years after the right of action first accrues. *See Impro Products, Inc. v. Block,* 722 F.2d 845, 850 (D.C. Cir. 1983). The right of action first accrues on the date of the final agency action.[5] *Id.*; *Sendra Corp. v. Magaw*. 111 F.3d 162, 165 (D.C. Cir. 1997). As the D.C. Circuit has long held, Section "2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such, it must be strictly construed." *Spannaus v. U.S. Dep't of Justice,* 824 F.2d 52, 55 (D.C. Cir. 1987) (citations omitted); *see West Virginia Highlands,* 540 F. Supp. 2d 125, 138 (4th Cir. 1998). Further, a jurisdictional statute of limitations, such as Section 2401(a) "cannot be overcome by the application of judicially recognized exceptions such as waiver, estoppels, equitable tolling, fraudulent concealment, the discovery rule, and the continuing violations doctrine." *Id.* (citations and alternations omitted). Instead, a "single violation…accrues on the day following the deadline" and a suit challenging such a violation is barred if filed outside the six-year statute of limitations. *Ctr. For Biological Diversity v. Hamilton,* 453 F.3d 1331, 1335 (11th Cir. 2006). Thus, where a party seeks to sue the United States pursuant to such a waiver of sovereign immunity, as Plaintiffs do here, the expiration of the statute of limitations on that claim is "construed as a bar to the court's subject matter

[5] In *Bennett v. Spear,* the U.S. Supreme Court set forth two conditions in order for an agency action to be deemed "final": "First, the action must mark the 'consummation' of the agency's decision making process – it must not be of a merely tentative or interlocutory nature." (citations omitted) Second, "the action must be one by which rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. 154, 177-78, 117 S.Ct. 1154, 1168 (1997) (citations omitted).

jurisdiction, and thus a proper subject for a motion to dismiss under Rule 12(b)(1)." *Felter, et al. v. Norton*, 412 F.Supp.2d 118, 125 (D.D.C. 2006); *West Virginia Highlands*, 540 F. Supp. 2d at 138.

Plaintiffs' Amended Complaint asserts claims against Federal Defendants that pertain, not to independent determinations of the August 2011 Decision, but, rather, to long-standing BIA determinations, which were used as the basis for the August 2011 Decision. Because these previous BIA decisions were never challenged by a single one of the Plaintiffs at the time of issuance or the six-year period thereafter, the statute of limitations governing such claims and the Plaintiffs' APA action have lapsed in their entirety. As such, this Court lacks subject matter jurisdiction to entertain Plaintiffs' time-barred claims. In challenging the Tribe's governing body and composition of five Tribal members, Plaintiffs also challenge the BIA's 1934 Final Agency Action, its 1966 Final Agency Action as well as the 1971 and 1993 Final Agency Actions pertaining to recognition of Mabel Hodge Dixie and her heirs as the sole members of the Tribe. (RAR Decl., Exs A and D thereto) Such determinations as to the Tribe's membership, including the denial to claims of membership by the heirs of the 1915 Census Indians in the 1966 Final Agency Action, were never challenged by Plaintiffs, and therefore, claims challenging recognition of the Tribe's membership is statutorily barred pursuant to 28 U.S.C. § 2401(a).

Plaintiffs' Amended Complaint also very clearly challenges the September 24, 1998 BIA final agency action which first recognized the Tribe's five member citizenship and their authority to establish a Tribal government, alleging that the BIA acted "erroneously" that the determination made therein as to the Tribe's membership "was and is incorrect." (Amended Complaint, ¶¶ 4-7; RAR Decl., Ex. D thereto). Neither the Non-Members, (who, apparently had yet to discover their "membership" at that time and were nowhere to be found), nor Mr. Dixie

ever challenged the 1998 Final Agency Action. Nor did Plaintiffs' challenge subsequent BIA final agency actions issued on February 2000 and March 2000, which reaffirmed the authority of the Tribe's governing body, pursuant to Resolution #GC-98-01, and its five federally recognized members. (RAR Decl., Exs. C, E and F thereto). By this APA action, Plaintiffs seek to challenge the underlying holdings of the 1998 Final Agency Action, the February 2000 Final Agency Action and the March 2000 Final Agency Action, including the validity of the Tribe's governing document itself which had, up until the present action, never been challenged. As the statute of limitations has long since expired to bring challenges to the well-settled and undisturbed BIA determinations pertaining to the membership and government of the Tribe, this Court lacks jurisdiction over Plaintiffs' time-barred claims.

B. <u>The Tribe is a Necessary and Indispensable Party to This Litigation and Cannot be Joined Because of Its Sovereign Immunity.</u>

The Plaintiffs' central allegations ─ that the Tribe's membership and governing body was improperly recognized by the Assistant Secretary despite almost a century of the United States' history with the Tribe and fundamental tenants of Federal Indian law — is a direct attack on the sovereignty and internal affairs of the California Valley Miwok Tribe. It is a direct attack on the right of the Tribe to establish its own form of government, and like other sovereign Indian nations, "to make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 217, 220 (1959).

It is a bedrock principle of federal Indian law that Indian tribes possess sovereign immunity from suit without their consent. *Kiowa Tribe of Okla. v. Mtg. Techs., Inc.,* 523 U.S. 751, 754 (1998); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509, (1991); *Santa Clara Pueblo v. Martinez,* 436 U.S. at 58; *Puyallup Tribe v. Wash. Dep't of Game,* 433 U.S. 165, 172-73 (1977); *U.S. v. U.S. Fidelity & Guar. Co.,* 309 U.S. 506, 512

(1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). Sovereign immunity prevents tribes such as the California Valley Miwok Tribe from being joined in litigation without their consent. *Id; see also Davis v. U.S.*, 343 F.3d 1282, 1289 (10th Cir. 2003); *Davis v. U.S.*, 192 F.3d 951, 959, & n.8 (10th Cir. 1999) (both involving Rule 19 analysis as applied to suit against Secretary over rights in Seminole Nation property and dismissing claims because joinder of necessary and indispensable Indian tribe was barred by tribal sovereign immunity); *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1459 (10th Cir. 1989) (dismissing on sovereign immunity grounds a case involving voting rights issues)

As demonstrated below, the California Valley Miwok Tribe is a necessary party to this action under Fed. R. Civ P. 19(a). However, because the Tribe cannot be joined due to its sovereign immunity from suit,[6] it is also an indispensable party under Rule 19(b). As such, its absence deprives this Court of jurisdiction over Plaintiffs' Amended Complaint. *Pueblo of Sandie v. Babbit*, 47 F. Supp.2d 49, 52 (D.D.C. 1999), *discussing Kickapoo Tribe of Indians v. Babbit*, 43 F.3d 1491, 1494 (D.C. Cir. 1995).

1. The Tribe is a Necessary Party Under Rule 19(a).

Rule 19(a) of the Federal Rules of Civil Procedure deems a party "necessary" if *any* of the following standards are met:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the person's absence may (i) as a

[6] C ourts have routinely recognized that a sovereign's voluntary intervention in a suit for the purpose of seeking dismissal for lack of jurisdiction does not waive its claim to sovereign immunity from suit. *See e.g., Kansas v. U.S.*, 249 F.3d 1213, 1220 (10th Cir. 2001); *Zych v. Wreched and Abandoned Vessel*, 960 F.2d 665, 667-68 (7th Cir. 1992); *Lac Du Flambeau Band of Lake Superior Chippewa Indians, et al. v. Norton*, 327 F.Supp.2d 995, 1000 (W.D. Wis. 2004); *Wyandotte v. Kansas City*, 200 F.Supp.2d 1279, 1287 (D.Kan. 2002); *Miami Tribe of Okla. v. Walden*, 206 F.R.D. 238 (D. Ill. 2001).

> practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). The standard is similar to the "impair or impede" standard for mandatory intervention under Rule 24(a)(2) and is readily met in this case.

At the very least, the Tribe is a necessary party under the test of Rule 19(a)(2)(i). *See American Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1022-1024 (9th Cir. 2002); *Manybeads v. United States,* 209 F.3d 1164, 1166 (9th Cir. 2000) *cert. denied*, 532 U.S. 966 (2001). The interest of the Tribe is amply demonstrated by the kinds of harm it would suffer if the Plaintiffs were granted the relief they request. As the U.S. District Court in Minnesota stated:

> The harm caused to the [tribe] and its members by imposing this relief far outweighs that caused by not issuing the injunction. Unseating…tribal officials, disrupting … membership determinations and … limiting the right to participate in [tribal] governance to purportedly "constitutionally qualified" [tribal] members fundamentally impairs the [tribe's] sovereign power of self-governance and self-determination.

Smith v. Babbitt, 875 F.Supp. at 1370 (D.Minn. 1995).

The Tribe has a clear "federally recognized interest in maintaining and protecting its sovereignty, which includes its ability to self-govern and determine the criteria for tribal membership." *St. Pierre v. Norton,* 498 F.Supp. 2d 214 (D.C. Cir 2007) (citing *Smith v. Babbitt,* 875 F.Supp. at 1370) Rule 19(a)(2)(ii) also applies here. A judgment rendered in the Tribe's absence would most certainly "impair or impede" the Tribe's ability to protect its interests as it would completely reverse almost a century of dealings between the Tribe and the United States and would eradicate the Tribe's established governing structure and membership. Any relief granted to Plaintiffs would also be adamantly opposed by the Tribe, potentially subjecting the

Federal Defendants to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest, which has been recognized in this district's application of Rule 19(a)(2)(ii). *See Kickapoo Tribe of Oklahoma v. Lujan,* 728 F.Supp.791, 796 (D.D.C. 1990). Therefore, the Tribe's compelling and legitimate interests in this case demonstrate that it is a necessary party to this litigation.

2. The Tribe is an Indispensable Party Under Rule 19(b).

Rule 19(b) provides that when a necessary party cannot be joined to a suit, the court must go on to determine whether that party is "indispensable" to the cause of action. Where parties are "indispensable," the action cannot proceed in "equity and good conscience" without them and, accordingly, must be dismissed. *American Greyhound,* 305 F.3d at 1024. Rule 19(b) sets out four factors to be considered in determining whether an absent party is indispensable to the cause of action:

> [f]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; [and] fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

The law applying these standards to Indian tribes as indispensable parties is well-established. As a bedrock proposition of tribal sovereignty, Indian tribes cannot be sued in court because of their sovereign immunity. *Supra,* Section III(B). Further, as the U.S. Supreme Court held in *Santa Clara Pueblo,* a tribe is immune from federal court jurisdiction in disputes regarding challenges to membership in the tribe. 436 U.S. at 51. *See also Montana,* 450 U.S. at 564. "This immunity flows from the fact that a 'tribe's right to define its own membership for

tribal purposes has long been recognized as central to its existence as an independent political community.'" *St. Pierre v. Norton*, 498 F.Supp.2d at 220 (*quoting Santa Clara Pueblo*, 436 at 76 n. 32). Thus, in those cases where Indian tribes are a necessary party but joinder under Rule 19(a) is not available due to tribal immunity, the courts must make a determination as to their indispensability under Rule 19(b). Although a district court generally has a considerable measure of discretion in weighing the above factors relevant to a Rule 19(b) analysis, that discretion is significantly "cabined" when the necessary party that cannot be joined possesses sovereign immunity from suit. *Kickapoo Tribe*, 43 F.3d at 1500. This district has noted, "there is very little room for balancing of other factors" set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests "compelling by [itself]." *Id.* at 1496 (citations omitted). Under such circumstances, Rule 19(b) calls for a much more "circumscribed inquiry." *Id.* at 1497. Particularly in this more limited framework, the relevant factors weigh in favor of dismissal.

Applying the four factors to be considered under Rule 19(b), it is clear that this case cannot move forward without the Tribe. Most importantly, a judgment for Plaintiffs would undoubtedly be prejudicial to the Tribe. The ruling would reverse decades of history between the Tribe and the United States, would undermine the Tribe's sovereign authority to make membership determinations, and could drastically alter form of government and the current makeup of the Tribe. Further, such a ruling would completely undermine the Tribe's authority to make independent membership determinations without federal interference. *See Montana*, 450 U.S. at 564, 101 S.Ct. 1245.

Second, it is difficult to imagine any way in which this Court could shape relief so as not to prejudice the Tribe. The relief that Plaintiffs' seek goes straight to the heart of the Tribe's

internal governance, seeking to obliterate almost a century of the Tribe's history and government to government relationship with the United States.

The third factor under Rule 19(b) also weighs in favor of dismissal of the Amended Complaint. Even if the Court were to grant Plaintiffs' requested relief, the Tribe itself, as a non-party to this lawsuit, would not be bound by the Court's order. As a consequence, the Tribe would likely file its own suit to enforce its right to determine membership issues, perhaps in a different jurisdiction. Thus, the Federal Defendants would be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. *See Davis v. U.S.,* 199 F.Supp.2d 1164, 1177 (W.D. Okla. 2002) ("The Court also finds compelling the very real possibility that defendants would incur a substantial risk of inconsistent legal obligations if the BIA officials were subsequently sued by the Seminole Nation for actions taken in violation of tribal law as a result of plaintiffs' success in this cause of action.") This district has also recognized this problem in its application of Rule 12(a)(2)(ii). *See Kickapoo Tribe of Okla. v. Lujan,* 728 F.Supp.at 791.

The appropriate forum for Plaintiffs to pursue their remedy is and has always been with the Tribe, as this is the exclusive forum authorized to make such sensitive membership determinations. While Plaintiffs may contend that Rule 19 will leave them without a judicial forum to litigate their claim, "this result is a common consequence of sovereign immunity, and the Tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *American Greyhound,* 305 F.3d at 1025. Indeed the absence of a judicial remedy is a basic feature of sovereign immunity.[7] *E.G. Seminole Tribe of Fla. v.*

[7] *See Kickapoo Tribe,* 43 F.3d at 1496 ("[T]here is very little room for balancing of other factors set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests compelling by themselves.") (citation

Florida, 517, 517 U.S. 44 (1996) (State sovereign immunity leaves tribes without judicial remedy regarding State obligation to negotiate with tribes in good faith under the Indian Regulatory Gaming Act).

The Tribe is thus clearly both necessary and indispensable to this suit. Since this Court cannot shape meaningful relief for the Plaintiffs without the presence of the Tribe and the Tribe is unavailable because it has not waived its sovereign immunity from suit, Plaintiffs' Amended Complaint and this entire action should be dismissed. *See, e.g. American Greyhound,* 305 F.3d at 1027.

C. Plaintiffs' Amended Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

Motions to dismiss brought under Rule 12(b)(6) test the legal sufficiency of the facts alleged in the complaint. *Mazaleski v. Truesdell*, 562 F.2d. 701 (D.C. Cir. 1977). To that end, a court "need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations." *Guam Indus. Servs., Inc. v. Rumsfeld,* 405 F. Supp. 2d 16, 19 (D.D.C. 2005) (citing *Warren v. District of Columbia,* 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning v. Clinton,* 292 F.3d 235, 242 (D.C. Cir. 2002)). Instead, a plaintiff must allege a "plausible entitlement to relief." *Bell v. Atl. Air Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

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and internal quotation marks omitted); *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.D.C. 1986) (the policy of sovereign immunity "accords to tribal sovereignty and autonomy a place in the hierarchy of values over society's interest in making tribes amenable to suit"); s*ee also Clinton v. Babbit,* 180 F.3d 1081, 1090 (9th Cir. 1999) (since Tribe's "interest in maintaining its sovereign immunity outweighs the interest of the plaintiffs in litigating their claim," action must be dismissed on indispensable party grounds); *Fluent v. Salamanca Indian Lease Auth*, 928 F.2d 542, 548 (2nd Cir. 1991) (where a Tribe is immune from suit "there is very little room for balancing of other factors," since "immunity may be viewed as one of those interests compelling by themselves") (citations and internal quotation marks omitted); *Enterprise Mgmt. Consultants v. U.S. ex rel Hodel, et al.,* 883 F.3d 890, 894 (10th Cir. 1989) (in determining whether to dismiss an action where an absent Tribe is a necessary party, other considerations are "outweighed by the Tribe's interest in maintaining its sovereign immunity").

Moreover, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not shown — that the pleader is entitled to relief," and therefore should be dismissed. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009).

Plaintiffs' Amended Complaint seeks relief that cannot be granted by this Court, and consequently, must be dismissed pursuant to Fed. R. Civ. P 12(b)(6). In their Amended Complaint, Plaintiffs boldly request that this Court provide relief by "[d]irecting the [Assistant Secretary] and the BIA establish government-to-government relations only with a Tribal government that reflects the participation of the entire Tribal community," including the Non-Members. (Amended Complaint ¶ F, p. 30) Plaintiffs are explicitly requesting that this Court enroll individuals that have never in the Tribe's history been recognized as Tribal members into a federally-recognized Tribe, despite the plethora of federal authority which definitively states that federal courts have no jurisdiction to take such action. *See supra* Section III(A)(2). The law is clear that this Court cannot make the Non-Members enrolled members of this Tribe. For the same reason, this Court cannot grant Plaintiffs' requested relief issuing an order that declares the August 2011 Decision to be in violation of Plaintiffs' substantive and procedural due process rights. To examine the merits of Plaintiffs' unfounded assertions would result in this Court delving into internal Tribal membership matters, an action over which it has no jurisdiction to pursue.

In their Amended Complaint, Plaintiffs also allege violations of ICRA, seeking declaratory relief from this Court that the August 2011 Decision was inconsistent with ICRA, despite the clear authority that ICRA does not permit claims against Federal Defendants and confers no rights on tribal members against the United States. *Stands Over Bull v. Bureau of*

Indian Affairs, 442 F.Supp. 360 (D.Mont. 1977). Further, to the extent that ICRA claims are raised in federal courts against Indian tribes, it is well-settled that tribal sovereign immunity bars ICRA from being used to create a cause of action against Indian tribes or its officers for deprivation of substantive rights. *See Santa Clara Pueblo*, at 436 U.S. at 59. The only remedy available from federal courts under ICRA is a writ of habeas corpus under 25 U.S.C. § 1301. *Id.* at 69-72. Plaintiffs seek no such relief; therefore, their claims are barred and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Because Plaintiffs' have not demonstrated a "plausible entitlement to relief," their Amended Complaint must be dismissed pursuant to Fed. R. Civ. P. Rule 12(b)(6). Further, because the Amended Complaint does not set forth facts supporting an actionable claim, it must be dismissed as to Federal Defendants as well. *Geronimo v. Obama,* 725 F.Supp2d 182, 187 (D.D.C. 2010); *see also*, *School for Arts in Learning Public Charter School v. Barrie*, 724 F.Supp.2d 86, 90, 2010 WL 2838533, at *4 (D.D.C. July 20, 2010) (dismissing complaint as to both moving defendant and non-moving defendant where the complaint failed to set forth facts supporting an actionable claim); *Barnes v. Dist. Of Columbia,* 2005 WL 1241132, at *3 (D.D.C. May 24, 2005) (granting dismissal for non-movant where basis for movant's dismissal applied to non-movant).

IV. CONCLUSION

For the foregoing reasons, the California Valley Miwok Tribe respectfully requests that this Court dismiss this action based on Plaintiffs' lack of standing and the Court's lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. Rule 12(b)(1), for Plaintiffs' failure to join a necessary and indispensable party, pursuant to Fed. R. Civ. P. 19 and for Plaintiffs' failure to state a claim upon which relief can be granted as required by Fed. R. Civ. P. Rule 12(b)(6).

Respectfully submitted this 13th day of December, 2011.

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